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June 26, 2007

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FILE NO.: 10654.0002

REPLY TO: New York

BY ECF

Hon. Colleen McMahon, USDJ
United States Courthouse
500 Pearl Street, Room 640
New York, New York 10007

Re: Hertzoff v. United Orthopaedic Appliances Co., Inc. 07 Civ. 03157 (CM)(MHD)

Dear Judge McMahon:

This firm represents defendants in the above matter. We are in receipt of a letter from opposing counsel today apparently hand-delivering a "courtesy" copy of an amended complaint in this proceeding to the Court. As opposing counsel notes in his letter, the parties have a preliminary conference scheduled with the Court this Friday, June 29, 2007, at 11:45 a.m. I write today in the hope that the Court can assist the parties at Friday's conference to resolve the actual filing date of Plaintiff's Amended Complaint in this action.

Mr. Hinckley sent the Amended Complaint to me by email and mail on June 8, 2007, following this firm's issuance of a Rule 11 letter regarding the initial Complaint filed in this action. We never received notification of any kind, however, that the Amended Complaint had been filed with the Court. This gave rise to confusion over which pleading was effective in this case and to which a response was required. Finally, last Friday, June 22, 2007, we were advised by Mr. Hinckley that, on some unspecified date, he had e-mailed the Amended Complaint to the clerk of the Court. However, we have checked the ECF system as of the date of this letter, and the Amended Complaint still does not appear on the Court's docket.

Hon. Colleen McMahon, USDJ

June 26, 2007

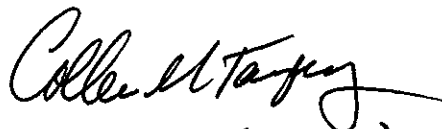
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In response, we advised opposing counsel that, pursuant to the rules of the Court with regard to ECF cases, the Amended Complaint had never been appropriately served or filed, as it had never been filed on the ECF system. We cited the Court's "3rd Amended Instructions for Filing an Electronic Case or Appeal," Rule 5, which states that, following the filing of the case-initiating complaint with the Court, "[a]ll subsequent documents, including defendant's answer, must be filed electronically on the ECF system at ecf.nysd.uscourts.gov. Electronic filing is not the same as email to the clerk." (emphasis in the original). We advised opposing counsel that his actions in failing to file the Amended Complaint on the ECF system, failing to notify us that he had e-mailed the Amended Complaint to the clerk of the Court, and the fact that the Amended Complaint still does not appear on the Court's docket, have left defendants confused regarding which pleading controls in this matter and when their time to respond to the Amended Complaint began to run, if at all. Opposing counsel has since graciously advised that, should defendants require additional time to respond to the Amended Complaint, he will consent to such an extension. We remain uncertain, however, as to whether that pleading is properly before the Court.

To compound matters somewhat, we received notice yesterday that the Amended Complaint had been hand delivered to chambers. Accordingly, we would ask the Court to help the parties resolve this issue at Friday's conference.

Finally, with regard to discovery scheduling in this matter, we have previously advised opposing counsel on a number of occasions that his unilateral action in sending this firm a proposed scheduling order was not sufficient to constitute a "conference" between counsel for FRCP 26 purposes. We have also further advised counsel that, until the issue of which pleading operates in this case is resolved, given that the operative pleading will affect the scope of discovery, we will not discuss scheduling of discovery. We are hopeful, however, the this issue will be resolved at Friday's conference with the Court, as well.

Respectfully submitted,



Colleen M. Tarpey (CT-7572)

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